89-1941

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1989

NANCY JANE BAKER,

Petitioner,

vs.

LLOYD W. AUBRY, JR., CALIFORNIA STATE LABOR COMMISSIONER,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where Congress has empowered the States to enact minimum wage and overtime laws, does the Federal Arbitration Act supplant California law and compel the arbitration of an overtime wage claim?[1]

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[1] Other than the parties appearing in the caption, the only other interested party is Fidelity Brokerage Services, Inc., denominated as a real party in interest in the lower court proceedings.

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MISCELLANEOUS

Rules of the United States Supreme Court Rule 13(1) 1

Petitioner Nancy Jane Baker (hereinafter "Baker") respectfully prays that a writ of certiorari issue to review a decision of the California Court of Appeal for the First Appellate District issued on December 22, 1989.

I

CITATION TO OPINIONS BELOW

The decision of the California Court of Appeal is officially reported at 216 Cal.App.3d 1259 and unofficially at 265 Cal.Rptr. 381. The court's decision appears in Appendix "A", *infra*. (App. 1a-12a.) The decision of the California Supreme Court denying Baker's petition for review appears in Appendix "B", *infra*. (App. 13a.)

II

JURISDICTION

The decision of the Court of Appeal was issued on December 22, 1989. Baker's petition for review to the California Supreme Court was denied on March 15, 1990. This petition for writ of certiorari was filed within ninety days of that date as provided for under 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of the United States Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

III

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 18(a) of the Fair Labor Standards Act (29 U.S.C. § 218(a)) provides in relevant part as follows:

> No provision of this chapter or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter . . .

Section 98(a) of the California Labor Code provides in relevant part as follows:

> The Labor Commissioner shall have the authority to investigate employee complaints. The Labor Commissioner may provide for a hearing in any action to recover wages, penalties, and other demands for compensation properly before the division or the Labor Commissioner including orders of the Industrial Welfare

> Commission, and shall determine all matters arising under his or her jurisdiction. . . . Within thirty days of filing of the complaint, the Labor Commissioner shall notify the parties as to whether a hearing will be held or whether action will be taken in accordance with section 98.3, or whether no further action will be taken on the complaint. If the determination is made by the Labor Commissioner to hold a hearing, the hearing shall be held within ninety days of the date of that determination. . . .

Section 229 of the California Labor Code provides as follows:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

The only constitutional provision implicated is the Supremacy Clause (Art. VI, cl. 2).

IV

STATEMENT OF THE CASE

A. THE FACTS

Baker was employed as a registered securities representative by Fidelity Brokerage Services, Inc. (hereinafter "Fidelity") from March 1986 to March 1987 and was paid

a weekly salary for her services. (App. 2a.) As a condition of her employment, Baker executed a Uniform Application for Securities Industry Registration or Transfer, commonly known as Form U-4. (App. 2a.) The form is in use throughout the securities industry and contains the following arbitration provision:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

(App. 2a.)

After resigning her employment with Fidelity, Baker filed a claim with the California Labor Commissioner asserting that she had worked in excess of eight hours per day but had not received overtime pay. (App. 2a.) A hearing was held before the Labor Commissioner on January 27, 1988. At the hearing, Fidelity objected to the Labor Commissioner's jurisdiction on the ground that the U-4 agreement executed by Baker required her to arbitrate her overtime claim. After Baker presented evidence in support of her overtime claim, the hearing was concluded. However, on August 23, 1988, the Labor Commissioner dismissed Baker's claim "[f]or want of statutory jurisdiction . . . " (App. 1a.)

B. PROCEDURAL HISTORY

On October 19, 1988, Baker petitioned the Alameda County Superior Court for a writ of mandate directing the Labor Commissioner to assume jurisdiction of Baker's

claim for unpaid overtime wages. Baker asserted that the Federal Arbitration Act did not require her to arbitrate her *statutory* claim for overtime wages. (Joint Appendix in Lieu of Clerk's Transcript 15-19, 255-257; App. 3a.)

The Superior Court refused to issue a writ. (App. 1a.) Baker then filed an appeal with the California Court of Appeal asserting, *inter alia*, that her right to overtime pay, a statutory right, is nonwaivable and not subject to arbitration and that, therefore, the California Labor Commissioner had jurisdiction to adjudicate her claim. (App. 6a.) On December 22, 1989, the Court of Appeal affirmed the Superior Court's decision, concluding that there was no difference between *a statutory wage claim* and *a contractual wage claim*. The court held:

> Baker's claim for overtime pay, even if based on a statutory right, is subject to arbitration. The broad language of the arbitration agreement here and the strong federal policy favoring arbitration of such agreements mandate the arbitrability of her claim. . . . Like the U-4 arbitration provision in Perry [v. Thomas, 482 U.S. 483 (1987)], the arbitration agreement here is governed by the Federal Arbitration Act and the policies behind it.

(App. 8a-9a.)

Baker then petitioned the California Supreme Court for review. By order dated March 15, 1990, the California Supreme Court denied the petition. (App. 13a.)

V

REASONS FOR GRANTING THE WRIT

DEFERRAL TO ARBITRATION IS INAPPROPRIATE WHERE CONGRESS PROVIDED FOR AN ALTERNATIVE STATE FORUM.

Pursuant to the power granted the States by Congress in the Fair Labor Standards Act (29 U.S.C. § 218(a)), California requires the payment of overtime compensation for hours worked in excess of eight hours in a day. *Skyline Homes, Inc. v. Dept. of Industrial Relations,* 165 Cal.App.3d 239, 211 Cal.Rptr. 792 (1985).[2] An employee who fails to receive such compensation may either pursue a direct action in the California courts or file a complaint with the office of the California Labor Commissioner. California Labor Code §§ 96, 98(a), 218. California law specifically provides that "[a]ctions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." California Labor Code § 229.

Notwithstanding the clear authority granted to the Labor Commissioner to adjudicate overtime claims, the Court of Appeal concluded that since Baker had executed an agreement to arbitrate, the Federal Arbitration Act (9 U.S.C. §§ 1, *et seq.*) preempted California law and required arbitration of her wage claim. The Court of Appeal believed that this result was commanded by this Court's decisions in *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520

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[2] In contrast, the Fair Labor Standards Act only requires overtime compensation for hours worked in excess of forty in a week. 29 U.S.C. § 207.

(1987) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987).

Those two cases, along with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346 (1985) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, ___ U.S. ___, 109 S.Ct. 1917 (1989), have resulted in widespread confusion as to the extent to which the Federal Arbitration Act preempts a whole host of employee rights created by Congress and the States. *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990) (federal age discrimination claim must be arbitrated). This confusion has arisen because of the apparent conflict between this Court's recent decisions favoring arbitration and the Court's previous holdings that the availability of arbitration does not foreclose an employee's right to pursue *judicial* relief to vindicate statutory wage and discrimination claims. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 101 S.Ct. 1437 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974); and *McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799 (1984).

In *Barrentine*, this Court held that an arbitration award, rendered under a collective bargaining agreement, did not preclude employees from pursuing an independent judicial action to vindicate a federal wage claim. Finding that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties", this Court concluded that wage claims arising under the Fair Labor Standards Act "are best protected in a judicial rather than arbitral forum . . . " 450 U.S. at 744-745. Similarly, *Gardner-Denver* held that an arbitration award, also rendered pursuant to a collective

bargaining agreement, did not preclude a judicial action for discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, *et seq.*).

Notwithstanding the obvious applicability of these cases to Baker's wage claim, the Court of Appeal distinguished *Barrentine* on the ground that it dealt with the reconciliation of two federal statutes and thus did not involve the preemption of a state statute. (App. 11a.) Here, the Court of Appeal reasoned, the issue is the preemptive reach of the Federal Arbitration Act. This facile distinction misses the point.

Preemption turns on Congress's intent, and where that intent is not expressly stated (such as with the Federal Arbitration Act), a court must divine it from other sources. *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., supra,* 473 U.S. at 627-628. In *Barrentine,* this Court concluded that Congress did not intend federal wage claims to be subject to arbitration. This holding necessarily extends to a claim brought under state law because the same expression of Congressional intent (the Fair Labor Standards Act) specifically empowers the States to act. (29 U.S.C. § 218(a).) California has done so and has provided that statutory wage claims brought under state law are not subject to arbitration. Thus, it should follow from *Barrentine* that Baker has a right to pursue her wage claim in the forum provided by the State of California – the Labor Commissioner's office.

Indeed, it is nonsensical to assert that a federal wage claim is not subject to arbitration while a state claim is; for in many instances, the claim would be identical. For

example, under both federal and California law, an employee is entitled to overtime compensation for hours worked in excess of forty in a week. An employee could assert such an entitlement under either federal or state law, and yet, under the Court of Appeal's analysis, would be required to arbitrate her state claim while free to litigate her federal claim. Obviously, Congress never intended such a dichotomy.[3]

The Court of Appeal justifies this bizarre result based on *Perry v. Thomas, supra.* In *Perry,* this Court held that the Federal Arbitration Act preempted California Labor Code Section 229 and required a securities employee, who had executed a U-4 agreement, to arbitrate his claim for an unpaid sales commission. However, *Perry* has nothing to do with a *statutory* wage claim. The employee's right to a commission was based on his *contractual* agreement with his employer, and not on statute. California law does not require the payment of commissions. If the employee had been permitted to pursue his claim in a

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[3] Neither *Barrentine* nor *Gardner-Denver* addressed the issue of Congress' intent under the Federal Arbitration Act since both cases involved arbitration which, in theory, was "compelled" pursuant to Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185). Nonetheless, since both cases discuss Congress' intent under the Fair Labor Standards Act and Title VII, they have direct applicability to any analysis of the preemptive reach of the Federal Arbitration Act vis-a-vis these two statutes. Moreover, the federal courts have disagreed as to whether the Federal Arbitration Act applies to collective bargaining agreements. *See generally American Postal Workers Union v. United States Postal Service,* 823 F.2d 466 (11th Cir. 1987).

judicial forum, he would not have relied on any California statute to vindicate his right to the unpaid commission. In stark contrast, the contractual agreement between Baker and Fidelity is irrelevant to Baker's overtime claim. To adjudicate her statutory claim no contractual interpretation is necessary, and thus, the federal interest underlying *Perry* – enforcing the parties' agreed-upon method of resolving contractual disputes – is lacking. *Cf. Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988) (state law claim not preempted where adjudication of the claim is not dependent upon an interpretation of the collective bargaining agreement).

Perry only holds that California cannot provide a judicial forum to resolve a *contractual* claim where an agreement to arbitrate exists. Nothing in *Perry* requires the arbitration of a statutory wage claim, and *Perry* is entirely consistent with *Barrentine*.[4] Simply stated, *Perry* does not address Congress' intent vis-a-vis statutory wage claims.

The relevant inquiry is whether Congress intended a wage claim brought under state law, which it specifically sanctioned, to be subject to arbitration. This Court's decisions holding that statutory claims arising under the federal antitrust laws, RICO, and the Securities and Exchange Act are subject to arbitration have little bearing

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[4] Until *Mitsubishi*, *McMahon*, and *Rodriguez de Quijas*, the distinction between arbitrating statutory and contractual claims seemed clear. Contractual claims had to be arbitrated while statutory claims did not. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra*, 473 U.S. at 646-647, 105 S.Ct. at 3364 (Justice Stevens dissenting in part).

on this analysis. *See Mitsubishi, supra; McMahon, supra;* and *Rodriguez de Quijas, supra.* Merely because certain statutory claims are subject to arbitration does not lead to the inevitable conclusion that all statutory claims are subject to arbitration. Quite to the contrary, *Barrentine, Gardner-Denver,* and *McDonald* exclude from arbitration claims arising under statutes establishing minimal employee protections.

Neither Congress nor California ever intended that an employee would be required to arbitrate a claim for overtime wages. California has provided an economic and efficient forum for the resolution of such claims, and employees should not be deprived of that forum absent a much more direct expression of Congressional intent. Surely, if Congress intended to prohibit the States from establishing their own forums to vindicate their minimum wage and overtime laws it would not have been silent on this point while simultaneously granting the States the power to legislate in this area.

The Court of Appeal's decision has far reaching consequences not only for statutory wage claims but for most, if not all, state laws establishing minimum employee protections. If the Court of Appeal's analysis is correct, the protections granted employees by state law will soon disappear. Already, other California courts of appeal have concluded, based on the same analysis present in this case, that age and sex discrimination claims brought under the California Fair Employment and Housing Act (California Government Code § 12940) must be arbitrated where a contractual agreement to arbitrate exists. *Cook v. Barratt American, Inc.*, ___ Cal.App.3d ___, 268 Cal.Rptr.

629 (1990) (" . . . we conclude federal law requires arbitration of this state-law-grounded claim of employment discrimination based on sex under the privately negotiated arbitration agreement here in question."); and *Hall v. Nomura Securities Int'l.*, 219 Cal.App.3d 43, 268 Cal.Rptr. 45 (1990).

Federal laws guaranteeing employee rights have also been placed in serious jeopardy. In *Gilmer v. Interstate/ Johnson Lane Corp., supra,* the Fourth Circuit Court of Appeal recently held, also based on this analysis, that a claim for age discrimination brought under the Federal Age Discrimination in Employment Act (ADEA) was preempted by the Federal Arbitration Act.[5] *But see Nicholson v. CPC Int'l., Inc.*, 877 F.2d 221 (3d Cir. 1989) (holding that an ADEA claim is not subject to arbitration).

In fact, this Court is presently confronted with the analogous question. In *Evans v. Southern Pacific Transportation Co.*, 213 Cal.App.3d 1378, 262 Cal.Rptr. 416 (1989) (petition for certiorari filed February 14, 1990, case no. 89-1396), a California court of appeal held that the Railway Labor Act (45 U.S.C. §§ 151, *et seq.*) did not preclude California from exercising jurisdiction over discrimination claims despite the broad arbitration provisions contained in that Act. Thus, under the decisions issued in *Cook, supra,* and *Hall, supra,* an employee who executes a private agreement to arbitrate must arbitrate state law discrimination claims while under *Evans* an employee subject to the Railway Labor Act need not. Though *Evans*

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[5] In a telephone communication between counsel, it was indicated that a petition for a writ of certiorari will be filed in that case with this Court.

arises under the Railway Labor Act rather than the Federal Arbitration Act, the issue is the same, to what extent did Congress intend to provide an independent judicial forum for such claims when it enacted Title VII and expressly empowered the States to pass their own anti-discrimination laws. *See generally California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 107 S.Ct. 683 (1987). The same question is also presented with respect to statutory wage claims since the Fair Labor Standards Act, like Title VII, contemplates state legislation.

If the judicial forums established for the adjudication of statutory wage and discrimination claims can be circumvented by private arbitration agreements, there is no reason why numerous other state law protections are also not subject to arbitration. State laws intimately regulate the relationship between an employer and an employee. All such laws (*e.g.*, workers' compensation, rest and lunch periods, occupational safety provisions, to name a few) are now in jeopardy because of the indiscriminate extension of this Court's decisions to such statutory claims. This Court must clearly establish the parameters which limit the Federal Arbitration Act and preserve to employees their state law forums to vindicate their state law rights. *Cf. Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410 (1987) (holding that the Railway Labor Act arbitration provision does not deprive a railroad employee of a right to bring a FELA claim).

Quite simply, state and federal courts have misconstrued the extent to which statutory protections can be subsumed through arbitration. The federal courts are split with respect to this issue (*see and compare Gilmer v. Interstate/Johnson Lane Corp., supra*, with *Nicholson v. CPC*

Int'l., Inc., supra), as are the California courts (as evidenced by the decisions issued in the instant case and *Cook v. Barratt American, Inc., supra,* in comparison with *Evans v. Southern Pacific Transportation Co., supra*). Until now, the *public* interest in insuring the payment of minimum wage and overtime compensation as well as the enforcement of anti-discrimination laws seemingly placed beyond question the right to adjudicate such claims in a public forum. Accordingly, certiorari should be granted in order to clarify the extent to which arbitration agreements deprive employees of the forums guaranteed under state and federal law.

VI

CONCLUSION

For the aforesaid reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[No. A045093. First Dist., Div. Three Dec. 22, 1989.]

NANCY JANE BAKER, Plaintiff and Appellant, v. LLOYD W. AUBRY, JR., as Labor Commissioner, etc., Defendant and Respondent;

FIDELITY BROKERAGE SERVICES, INC., Real Party in Interest.

OPINION

MERRILL, J. – Appellant Nancy Jane Baker filed a complaint with respondent State of California Labor Commissioner (hereinafter Commissioner), seeking overtime pay from her former employer, respondent Fidelity Brokerage Services, Inc. (hereinafter Fidelity). At the hearing on Baker's complaint, Fidelity challenged the Commissioner's jurisdiction by asserting that the matter was subject to arbitration. After taking the jurisdictional objection under submission, the Commissioner dismissed Baker's complaint "[f]or want of statutory jurisdiction."

By her petition for writ of mandate, Baker sought to compel the Commissioner to assume jurisdiction over and adjudicate her complaint. An alternative writ of mandate issued. Following hearing, the superior court denied Baker's petition. She appeals.

I.

(1) Preliminarily we note that on review of the trial court's ruling on a writ of mandate, an appellate court is ordinarily limited to an inquiry respecting whether substantial evidence supports the judgment. However, this limitation is inapplicable to questions of law where the facts are undisputed. In such instances the appellate court

is not bound by the trial court's determination but may make its own determination. (*Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407 [216 Cal.Rptr. 782, 703 P.2d 122].) The following undisputed facts were before the trial court.

Baker was employed by Fidelity from March 1986 to March 1987. In connection with her employment, Baker executed a "Uniform Application for Securities Industry Registration or Transfer," commonly known as the "U-4," The following provision is contained within the U-4, "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time." Item 10 of the U-4 indicated that Baker was to be registered with the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD). Rule 347 of the NYSE provides: "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules." During her employment with Fidelity, Baker was, in fact, registered with the NYSE as a general securities representative.

The basis of Baker's claim was that she worked in excess of eight hours per day and did not receive overtime pay.

At the hearing on Baker's petition for writ of mandate, the superior court found the existence of a valid agreement to arbitrate between Baker and her employer. In addition, the court rejected Baker's argument that her overtime pay claim was based on statutory rights and therefore not subject to arbitration.

II

(2a) Baker's first argument on appeal is that the U-4 does not encompass a valid agreement to arbitrate. She submits that the purported incorporation by reference of the NYSE rules was not sufficiently clear and unequivocal so as to form a binding arbitration agreement. Baker relies exclusively on *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632 [223 Cal.Rptr. 838] for her position.

The *Chan* court analyzed whether the U-4 document signed by the employee there constituted a valid arbitration agreement. Drexel argued that the following provision in the U-4 form adequately incorporated NYSE rule 347 by reference: " 'I agree to abide by the Statute(s), Constitution(s), Rule(s) and By-Laws as any of the foregoing are amended from time to time of the agency jurisdiction or organization with or to which I am filing or submitting this application; . . . ' " (*Chan v. Drexel Burnham Lambert, Inc., supra,* 178 Cal.App.3d at p. 636.) The appellate court held no valid arbitration agreement was entered into by the parties as there was no clear and unequivocal reference to the incorporated document.

(3) It is well settled that disputes between a member of a national stock exchange and its employee are governed by the Federal Arbitration Act, 9 United States Code section 1 et seq., where there is a binding arbitration agreement. (*Id.*, at p. 638, and cases there cited; see also *Thomas v. Perry* (1988) 200 Cal.App.3d 510, 515 [246 Cal.Rptr. 156].) In such instances, questions concerning the construction and scope of the arbitration clause are determined by federal law. (*Chan v. Drexel Burnham Lambert, Inc., supra,* 178 Cal.App.3d at pp. 639-640.) However, the "existence of a valid agreement to arbitrate involves general contract principles, and state law governs disposition of that question. [Citations.]" (*Id.* at p. 640.) Thus, the *Chan* court concluded California contract law principles must be applied in determining whether rule 347 was an enforceable provision of the contract.

(4) Under California law, parties may validly incorporate by reference into their contract the terms of another document. The reference to the incorporated document must be " ' . . . " . . . *clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.*" ' [Citations.]" *Chan v. Drexel Burnham Lambert, Inc., supra,* at p. 641.)

The *Chan* court held that the U-4 form at issue there failed to incorporate NYSE rule 347 by reference. The court found the reference to the rule to be amorphous, failing to guide the reader to the incorporated document. (*Id.*, at p. 643.). The court reasoned: "The language in paragraph 2C of the U-4 application set forth only that Chan agreed to abide 'by the Statute(s), Constitution(s),

Rules and Bylaws' and any amendments of the three organizations to which Chan's application was to be submitted. *Arbitration is nowhere mentioned in paragraph* 2C. One of the organizations to which Chan submitted the application was the NYSE, which promulgated Rule 347, the rule requiring arbitration. However, even assuming paragraph 2C referred specifically to the NYSE, the reader would thereafter be required to seek out Rule 347 thereof to locate the arbitration clause." (*Id.*, at p. 643, italics added.)

Chan distinguished the opinion in *King v. Larsen Realty, Inc.*, (1981) 121 Cal.App.3d 349 [175 Cal.Rptr. 226], which found arbitration provisions in the bylaws of a real estate board had been incorporated by reference into the parties' membership agreement. In *King*, the contract provided that the member agreed to abide by the constitution, bylaws, rules and regulations of the local real estate board and those of the state association. The bylaws of the local board required members to arbitrate disputes as set forth in the state associations' arbitration manual. The court found that the parties agreed to abide by the bylaws, and that the bylaw provision providing for arbitration properly incorporated by reference the separate arbitration manual. (*King v. Larsen Realty, Inc. supra*, 121 Cal.App.3d at pp. 353-357.) The distinguishing factor in *King*, found lacking in *Chan*, was the fact that the incorporated document was readily available to the appellants. (*Id.* at p. 357; *Chan v. Drexel Burnham Lambert, Inc. supra*, at p. 641.)

(2b) The U-4 form at issue in the instant case is markedly different from the form at issue in *Chan*. The most significant distinction is that the U-4 form signed by

Baker clearly indicated her agreement to *arbitrate*. The basic arbitration provision was contained in the U-4 itself and not in a secondary document. In *Chan* the U-4 form contained no language notifying the applicant of an arbitration provision. The applicant there was forced to search the body of rules to find the arbitration provision.

Additionally, the U-4 form here described generally the nature of the disputes to be arbitrated. Reference to rule 347 was required only for the scope of the arbitration clause. The form in *Chan* contained no such provision.

A valid arbitration agreement exists in the instant case. Baker agreed to arbitrate disputes as required by the bylaws, rules and constitutions of the organizations with which she registered in item 10 of the U-4. Baker herself indicated her registration with the NYSE in item 10 of the form. The rules of the NYSE were readily available to her as Baker had been registered with that organization for most of the four-year period prior to her execution of the U-4 here. The U-4 form signed by Baker reveals a binding arbitration agreement.

III

(5a) Baker next asserts that even if a valid arbitration agreement exists, such agreement would not govern her claim to overtime pay. She submits that her right to overtime pay is statutory in nature, as opposed to contractual, and therefore may not be waived by any agreement to arbitrate. We find no merit in this contention.

(6) Arbitration agreements which are a part of contracts evidencing interstate commerce are governed by

section 2 of the Federal Arbitration Act.[1] " 'Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.' " (*Perry v. Thomas* (1986) 482 U.S. 483, 489 [96 L.Ed.2d 426, 435, 107 S.Ct. 2520], quoting *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24 [74 L.Ed.2d 765, 785, 103 S.Ct. 927].) By enacting section 2, " ' . . . Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " (*Perry v. Thomas, supra,* 482 U.S. at p. 489 [96 L.Ed.2d at p.435], quoting *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10 [79 L.Ed.2d 1, 12, 104 S.Ct. 852].) The act reflects "Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." (*Perry v. Thomas, supra,* 482 U.S. at p. 490 [96 L.Ed.2d at p. 436].) The duty to enforce arbitration agreements under the Federal Arbitration Act is not diminished when a party to the arbitration agreement raises a claim based on statutory rights.

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[1] Section 2 of 9 United States Code provides in pertinent part: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

(See *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 226-227 [96 L.Ed.2d 185, 193-194, 107 S.Ct. 2332] [concerning arbitrability of claims under Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act (RICO)].)

Perry concerned the arbitrability of a dispute over commissions from the sale of securities. As in the instant case, the former employee of a securities broker had executed a U-4 form in connection with his employment. The arbitration provision of the U-4 in *Perry* contained exactly the same language as the arbitration provision here. The former employee challenged the arbitrability of the dispute on the ground that section 229 of the Labor Code authorized the maintenance of his action notwithstanding an agreement to arbitrate. (*Perry v. Thomas*, supra, 482 U.S. at pp. 484-486 [96 L.Ed.2d at pp. 432-433].)

The United States Supreme Court held that, under the Supremacy Clause (U.S. Const., art. VI, cl. 2), section 2 of the Federal Arbitration Act preempts a California statute providing for the maintenance of wage collection actions "without regard to the existence of any private agreement to arbitrate." (See Lab. Code, § 229.) The high court reasoned that the federal and state statutes were in direct conflict; accordingly, the state statute must give way. (*Perry v. Thomas, supra*, 482 U.S. at pp. 490-491 [96 L.Ed.2d at pp. 435-436].)

(5b) Baker's claim for overtime pay, even if based on a statutory right, is subject to arbitration. The broad language of the arbitration agreement here and the strong federal policy favoring arbitration of such agreements mandate the arbitrability of her claim. The U-4 arbitration

provision set forth the parties' agreement to arbitrate any dispute or claim between Baker and Fidelity, as set forth in the rules of the organization with which she registered. The NYSE rule 347 requires arbitration of any employment-related controversy between a registered representative and a member of the exchange. Like the U-4 arbitration provision in *Perry*, the arbitration agreement here is governed by the Federal Arbitration Act and the policies behind it.

Baker states that her right to overtime pay is not based on any contractual right but has been conferred upon her by the Legislature. (See Lab. Code, § 510; *Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404 [247 Cal.Rptr. 205].) Therefore, she argues, her overtime pay claim is independent of any employment-related claim and may not be waived by an agreement to arbitrate. We disagree. Construction of the valid arbitration agreement presented here is governed by section 2 of the Federal Arbitration Act which favors strongly the enforcement of such agreements. The Federal Arbitration Act preempts our state law in this area.

Baker's reliance on *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728 [67 L.Ed.2d 641, 101 S.Ct. 1437], for the proposition that wage claims based on a statutory right are not subject to arbitration, is misplaced. The *Barrentine* court held that rights which devolve upon employees as individual workers, and not as members of a union, are independent of the collective bargaining process and are not waivable by an agreement to arbitrate. The statutorily based rights at issue in *Barrentine* arose from the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201). "While courts should defer to an arbitral

decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." (*Barrentine v. Arkansas-Best Freight System, supra,* 450 U.S. at p. 737 [67 L.Ed.2d at p. 651].) The court noted the tension between the national labor policy favoring collective bargaining, as reflected in the National Labor Relations Act of 1935 (the Taft-Hartley Act) (29 U.S.C. § 151 et seq.) and the national labor policy guaranteeing specific substantive rights to individual employees, the FLSA. While strong national labor policy supports collectively bargained dispute resolution procedures for disputes arising out of the collective bargaining process, FLSA rights have consistently been held to be nonwaivable because of the importance of the rights guaranteed. (*Id.* at p. 740 [67 L.Ed.2d at pp. 653-654].)

The *Barrentine* court reasoned that a FLSA claim to minimum wage or overtime could be lost if submission to arbitration precluded an independent FLSA suit. First, the court considered the possibility that a union may reasonably and in good faith decide not to pursue vigorously a member's FLSA claim in the arbitration process. Second, even if the union pursued strongly the wage claim, the employee's statutory rights may still suffer at the hands of an arbitrator unfamiliar with the complex nature of a FLSA claim. (*Id.* at pp. 742-743 [67 L.Ed.2d at p. 655].) Additionally, the *Barrentine* court emphasized that an arbitrator may be powerless to grant an aggrieved employee the full range of relief which is authorized by

the FLSA inasmuch as the arbitrator is limited by the terms of the collective bargaining agreement.

Barrentine is readily distinguishable from the instant case. In the first instance, *Barrentine* did not involve the preemption of a state statute by a conflicting federal statute. The conflict in *Barrentine* concerned the competing interests under two federal statutes.

Moreover, the court's rationale for determining the nonarbitrability of FLSA claims is not present in the case here. As collective bargaining does not come into play in the instant case, there is no concern about a union's less than vigorous pursuit of Baker's claim in the arbitration process. She would have complete control over the presentation and advocacy of her overtime claim in arbitration. Second, any potential complexity in an overtime pay claim, standing alone, does not suffice to counter the strong policies behind the Federal Arbitration Act favoring arbitration of this dispute. (See *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 633 [87 L.Ed.2d 444, 459, 105 S.Ct. 3346].) Finally, unlike the FLSA claim at issue in *Barrentine*, under the broad language of rule 347, as read into the U-4 form here, an arbitrator is empowered to grant Baker the relief requested, if warranted.

Resolution of Baker's overtime pay claim by arbitration does not deprive her of her substantive rights. It only changes the forum in which they will be resolved. (See *Mitsubishi Motors v. Soler Chrysler-Plymouth, supra,* 473 U.S. at p. 628 [87 L.Ed.2d at p. 456].)

The judgment is affirmed.

White, P.J., and Barry-Deal, J., concurred.

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Three,
No. A045093 S013994
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK
Filed MAR 15 1990

NANCY JANE BAKER, Petitioner

v.

CALIFORNIA STATE LABOR COMMISSIONER,
Respondent

FIDELITY BROKERAGE SERVICES INCORPORATED,
Real Party In Interest

Petition for review DENIED.

LUCAS
Chief Justice

Supreme Court, U.S.
FILED
JUL 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1941

In The

Supreme Court of the United States

October Term, 1989

NANCY JANE BAKER,

Petitioner,

vs.

LLOYD W. AUBRY, JR., CALIFORNIA STATE LABOR COMMISSIONER, and FIDELITY BROKERAGE SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As applied to an arbitration agreement contained in a contract involving commerce, does the Federal Arbitration Act preempt the portion of California Labor Code Section 229 that invalidates agreements requiring arbitration of claims for "due and unpaid wages"?[1]

---

[1] Fidelity's principal objection to Baker's statement of the question presented is that it suggests that Congress has given states some special powers in this area. This erroneous suggestion, made without supporting authority, has never been raised below and is not a proper issue in Baker's Petition.

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Respondent Fidelity Brokerage Services, Inc., respectfully prays that a writ of certiorari not issue to review the decision of the Court below.

I.

STATEMENT OF THE CASE

The relevant facts, as found by the Court below and unchallenged here, can be stated briefly. Fidelity Brokerage Services, Inc. ("Fidelity") employed Nancy Jane Baker ("Baker") as a Registered Representative from March 1986 to March 1987. In connection with her employment as a Registered Representative, Baker executed a Uniform Application for Securities Industry Registration, which is commonly known as a U-4 and which is utilized throughout the securities industry. The U-4 contains the following arbitration agreement:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

In item 10, Baker indicated that she was registering with the New York Stock Exchange ("NYSE"). NYSE Rule 347 requires arbitration as follows:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the

> instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

After leaving Fidelity, Baker filed a Complaint with the California Labor Commissioner in August 1987 alleging that she was improperly denied overtime pay in violation of state law. Fidelity answered this Complaint, denying the claim on the merits but simultaneously asserting its right to arbitrate the claim. A hearing before a Deputy Commissioner was held on January 27, 1988. After briefing of the issue by all the parties, the Labor Commissioner dismissed Baker's wage claim for want of statutory jurisdiction in light of her arbitration agreement. Baker sought review of this decision in the California courts by writ of mandate.

Both the California Court of Appeal and the Superior Court held that Baker's U-4 and Rule 347 operated together to create a valid arbitration agreement under California law. The Courts below also held that this arbitration agreement involved commerce and was therefore subject to the Federal Arbitration Act. The Courts, applying that Act, found that this arbitration agreement was sufficiently broad to encompass Baker's claim for overtime under state law.

II.

REASONS THE PETITION SHOULD NOT BE GRANTED

A. This Court Has Recently Addressed The Same Issue Presented In This Case.

In light of the factual findings below, which are unchallenged here, the only issue presented is whether the provision of California Labor Code Section 229 invalidating certain arbitration agreements is preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

This Court has recently addressed precisely this issue in *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). In *Perry*, the plaintiff brought a claim for wages due. The plaintiff in *Perry* had executed the standard U-4 arbitration agreement presented in this case. In an attempt to avoid arbitration, he had also relied on California Labor Code Section 229, the same statute at issue here. Section 229 exempts from arbitration claims brought under the "provisions of this article [of the Labor Code] for the collection of due and unpaid wages. . . ." Thus, *Perry* presented exactly the same issue presented by this case: how should a court reconcile a direct conflict between an arbitration agreement found to affect commerce (and thus subject to the Federal Arbitration Act) and Labor Code Section 229, a state statute, that purports to exempt certain classes of claims from arbitration?

This Court in *Perry* analyzed the issue, applying standard preemption doctrine. Under the Federal Arbitration Act, arbitration clauses are specifically enforceable as a matter of federal law. California Labor Code Section 229, a state statute, plainly states that various claims relating

to wages are not arbitrable. In light of the Supremacy Clause, this Court held that the Federal Arbitration Act (rather than any inconsistent state law) must be given effect:

> "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered. We have accordingly held that these agreements must be 'rigorously enforce[d].' " This clear federal policy places § 2 of the Act in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.

Id. at 2526 (citations omitted).

It is plain from the *Perry* opinion that the federal policy favoring arbitration requires the preemption of all conflicting state laws:

> "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.* Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."

Id. at 2525 (citation omitted; emphasis added; *quoting Southland Corp. v. Keating*, 465 U.S. 1, 10, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

The California courts correctly applied *Perry* in this case, holding that Baker must arbitrate her claim under Labor Code Section 229, notwithstanding any California policy to the contrary.

Baker attempts to avert the clear holding of the *Perry* case by arguing that only contractual claims – not statutory claims – are covered by that decision. The short answer to this argument is that *Perry* itself involved a claim under the same statute relied upon by Baker here: Labor Code Section 229.[2] In *Perry*, the plaintiff attempted to invoke Section 229 to obtain a judicial resolution of claims for certain commission payments. Here, Baker seeks to invoke Section 229 to obtain a judicial resolution of her overtime pay claim. There is simply no basis to distinguish this case from *Perry*.

In short, this case *is Perry*. Baker has made no attempt to argue that *Perry* should be overruled. Its holding is completely in step with this Court's other recent pronouncements on arbitration. *See* footnote 2, *supra*. Thus, there is no reason whatever that this Court should again examine California Labor Code Section 229 only three years after *Perry*.

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[2] It should be noted that the argument that statutory claims are not arbitrable has been rejected repeatedly in the recent past, both before and after *Perry*. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, ___ U.S. ___, 109 S.Ct. 1917, 1921, 104 L.Ed.2d 526 (1989) (holding that statutory securities claims are arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (holding that statutory claims for securities fraud and RICO claims are arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (holding that antitrust claims are arbitrable); *Southland Corp. v. Keating*, *supra*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (holding that claims under the California Franchise Investment Act are arbitrable, notwithstanding a contrary state statute).

B. Baker Has Not Demonstrated Any Confusion In The Law Or Pressing Need To Address This Issue.

1. There is no confusion in the law.

Baker's Petition alludes to the need to clarify the law. This contention has no substance, for she has failed to identify any confusion in this area.

Baker relies primarily on *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), in support of this argument. *Barrentine* addressed the question of whether a member of a collective bargaining unit must arbitrate his federal wage claims and is readily distinguishable.

First, *Barrentine* involved a narrow arbitration agreement typical of a collective bargaining agreement rather than the broad private arbitration agreement involved in this case. Under Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, only claims that require interpretation of the collective bargaining agreement are subject to arbitration in the collective bargaining context. *Id.* at 737; *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) (arbitration proper in collective bargaining context only as to claims "inextricably intertwined" with the collective bargaining agreement). *Barrentine* says nothing about arbitration under the Federal Arbitration Act, which empowers arbitrators to hear virtually any claim. *See Perry, supra*, 107 S.Ct. at 2525-2527. *See also* footnote 2, *supra*.

Sound policy underlies the distinction between collective bargaining arbitration and private arbitration under the Federal Arbitration Act, as shown by a comparison of this case with *Barrentine*. In *Barrentine*, in ruling

that claims under the Fair Labor Standards Act are not subject to collective bargaining arbitration, this Court noted that, first, the union controls the right to bring a grievance to arbitration in the collective bargaining context; thus, if limited to the arbitral remedy, the individual might lose his claim by the union's failure to pursue it. *Id.* at 1446. Second, this Court emphasized that a collective-bargaining arbitrator's sole duty is to interpret the *contract;* a collective bargaining arbitrator's decision based on his view of *statutory* law – rather than the contract – is unenforceable. *Id.* at 1446-47. Finally, the Court noted that collective bargaining arbitrators lack the power to grant a full range of remedies. *Id.* Based on these considerations, *Barrentine* held the federal wage claims in question were not arbitrable.

None of the factors conclusively relied upon in *Barrentine* is present in arbitration under the Federal Arbitration Act. First, the individual – not a third party such as a union – fully controls his claim. Second, the arbitrator under the Federal Arbitration Act is not required to ignore statutory law but, in fact, is bound to apply it. *See* cases cited in footnote 2, *supra.* Finally, the arbitrator under the Federal Arbitration Act has plenary power to award all appropriate relief. *E.g., McMahon, supra* (arbitrator may award treble damages and attorney's fees under RICO). Thus, the distinction between the rule applicable in individual arbitration under *Perry* versus the rule applicable in collective bargaining arbitration under *Barrentine* is founded on sound public policy.

Barrentine is distinguishable in one other regard, vital under federal supremacy principles: it involved two

federal statutes (Section 301 and the Fair Labor Standards Act), which this Court was attempting to harmonize. This case involves a direct clash between a *state* statute and a *federal* statute. Under the Supremacy Clause, the federal statute (the Federal Arbitration Act) controls.[3]

2. No pressing legal issue is presented on these facts.

Baker's attempt to justify a writ of certiorari based on the importance of the issue presented also fails. Baker's argument that a whole panoply of state labor protections will be lost is without substance.

First, the unspoken premise of Baker's argument is that an arbitrator will be unfair in applying California's labor law. That argument is wholly insubstantial: Baker has made no effort at any time during this proceeding to challenge the fairness of the arbitral tribunal. There is no evidence that any substantive right will be lost or threatened if she is forced to abide by her arbitration agreement; the dispute will simply be adjudicated in an

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[3] The other cases on which Baker seeks to rely are distinguishable on the same bases as *Barrentine. McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) (employee need not arbitrate federal discrimination claim under his collective bargaining agreement); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (same); *Evans v. Southern Pacific Transportation Co.*, 213 Cal.App.3d 1378, 262 Cal.Rptr. 416 (1989), *cert. denied*, 58 U.S.L.W. 3800 (1990) (same under analogous provisions of Railway Labor Act).

arbitral forum. In light of the strong federal policy favoring arbitration that has evolved over the last few decades, it is simply too late in the day to argue that merely compelling a party to comply with an arbitration agreement violates any fundamental tenet of public policy.

Second, Baker's argument that important questions are left unanswered by the current state of the law misses the mark. It may be that, after extensive experience with *Perry*, the lower courts will need additional guidance in refining or even limiting the scope of federal preemption in some areas. It may even be that, under some future circumstances, arbitration might be shown to result in the loss or infringement of important contractual or statutory rights. But this case does not present any such circumstances. There is no confusion, after *Perry*, on the issue presented here.

In short, this Court should not revisit the *Perry* case only three years after it was decided. Prior to attempting to define the precise contours of the *Perry* rule, this Court should await future cases that actually probe the limits of the wisdom and soundness of *Perry's* teaching. Only then, with the aid of lower court experience in the interim, will this Court be in an ideal position to cast further light on this issue.[4]

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[4] Baker's reliance on *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990) and *Nicholson v. CCP Int'l Inc.*, 877 F.2d 221 (3d Cir. 1989), is simply baffling. Both of those cases address the issue of whether *federal* age claims must be arbitrated. This case, regardless of how determined, would not serve to answer that question or clarify it in any way.

III.

CONCLUSION

Based on the foregoing, Respondent Fidelity Brokerage Services, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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